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TABLE OF CONTENTS

PAGE

Amici States i

Table of Authorities vii

Statement of Interest of *Amici Curiae* 1

Summary of Argument 3

ARGUMENT:

I. THIS COURT SHOULD GRANT PLENARY CONSIDERATION BECAUSE THE ISSUE PRESENTED IS OF GREAT IMPORTANCE TO ALL STATES AND MILLIONS OF EMPLOYEES THROUGHOUT THE COUNTRY 4

II. WHETHER A SIMPLE PROMISE TO PAY SEVERANCE BENEFITS CONSTITUTES A "WELFARE BENEFIT PLAN" WITHIN THE MEANING OF ERISA IS A SUBSTANTIAL QUESTION WARRANTING THIS COURT'S PLENARY CONSIDERATION 9

A. Congress Did Not Intend That ERISA Regulate Employer Promises to Pay Benefits to Employees 9

1. Congress Intended ERISA to Regulate the Unregulated Field of Benefit Plans 9

2. Congress Did Not Intend ERISA to Supplant and Nullify Direct Employer Liability for Employee Benefits 12

PAGE

B. United States Department of Labor Regulations Interpreting ERISA Establish That an Employer's Promise to Pay Benefits Directly to Its Employees Out of the Company's General Assets Is Not a "Plan" Within the Meaning of ERISA 15

CONCLUSION 17

APPENDIX A1

TABLE OF AUTHORITIES

Cases: PAGE

Gilbert v. *Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *appeal filed sub nom. Roberts* v. *Burlington Industries, Inc.*, 54 U.S.L.W. 3179 (U.S. Oct. 1, 1985) (No. 84-441) 2

Horn v. *Mullins*, 650 F.2d 35 (4th Cir. 1981) 8

Nachman Corp. v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980) 9, 13, 14

People v. *Vetri*, 309 N.Y. 401, 131 N.E.2d 568 (1955) 5

Pompano v. *Michael Schiavone & Sons, Inc.*, 680 F.2d 911 (2d Cir. 1982) 7–8

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 9

Smith v. *CMTA-IAM Pension Trust*, 654 F.2d 650 (9th Cir. 1981) 8

Federal Statutes:

Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et seq.* (1982)

§ 14, 29 U.S.C. § 633 4

Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1982)

§ 1104, 42 U.S.C. § 2000h-4 4

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* (1982) ..... *passim*

§ 3, 29 U.S.C. § 1002 15

§ 102, 29 U.S.C. § 1022 13

§ 103, 29 U.S.C. § 1023 13

Federal Statutes (continued): PAGE

§ 104, 29 U.S.C. § 1024 13

§ 111(a)(1), 29 U.S.C. § 1031(a)(1) 10

§ 203, 29 U.S.C. § 1053 11

§ 302, 29 U.S.C. § 1082 11

§ 402, 29 U.S.C. § 1102 ..... 11, 13

§ 403, 29 U.S.C. § 1103 11

§ 404, 29 U.S.C. § 1104 11

§ 406, 29 U.S.C. § 1106 13

§ 407, 29 U.S.C. § 1107 13

§ 502(a), 29 U.S.C. § 1132(a) 7, 11

§ 502(d), 29 U.S.C. § 1132(d) 13

§ 502(f), 29 U.S.C. § 1132(f) 11

§ 4021, 29 U.S.C. § 1321 11

§ 4022, 29 U.S.C. § 1322 11

§ 4023, 29 U.S.C. § 1323 11

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1982)

§ 18, 29 U.S.C. § 218 4

Welfare and Pension Plans Disclosure Act, 29 U.S.C. § 301 *et seq., repealed by* § 111(a)(1) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1031(a)(1) (1982) 10

Federal Court Rules:

Rules of the United States Supreme Court, Rule 36.4 1

State Statutes: PAGE

N.Y. Gen. City Law §§ 18 and 20(27) (McKinney 1968) 5

N.Y. Labor Law § 191, subd. 3 (McKinney Supp. 1984-1985) 5

N.Y. Social Serv. Law § 390 (McKinney 1983) 5

N.C. Gen. Stat. § 95-25.7 (1981) 2, 5

Regulations:

29 C.F.R. § 2510.3-1 15

40 Fed. Reg. 24642 (June 9, 1975) 15

Legislative History:

120 Cong. Rec. 4285 (Feb. 26, 1974), *reprinted in* 2 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 3388 (Comm. Print 1976) 12

H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639 .....9, 10, 12

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Senate Committee on Labor and Public Welfare, Interim Report of Activities of the Private Welfare and Pension Plan Study, S. Rep. No. 634, 92d Cong., 2d Sess. (1972) 10, 12

Other Authorities:

"Employee Benefits in Medium and Large Firms, 1984", U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2237 (June 1985) 6

1906, Op. N.Y.S. Att'y Gen. 448 5

No. 85-944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN C. BROOKS, Commissioner of Labor
of the State of North Carolina,

Appellant,

—against—

BURLINGTON INDUSTRIES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF NEW YORK, *ET AL.* IN SUPPORT OF APPELLANT JOHN C. BROOKS

Statement of Interest of *Amici Curiae*

This brief is filed on behalf of 33 states as *amici curiae* pursuant to Rule 36.4 of the Supreme Court Rules, in support of the Jurisdictional Statement of appellant John C. Brooks, Commissioner of Labor of the State of North Carolina.

The issues raised by the appeal in this case are of critical importance to all states, including New York and the thirty-two other *amici* joining in this brief.* The

* This case is of particular interest to the State of New York, because its Commissioner of Labor has appealed to this Court

(footnote continued on following page)

Court of Appeals for the Fourth Circuit held that N.C. Gen. Stat. § 95-25.7, which requires employers to pay their employees all promised wages promptly after termination of the employment relationship, is preempted by the Employee Retirement Income Security Act, as amended, ("ERISA") 29 U.S.C. § 1001 *et seq.*, to the extent that the State law would require appellee Burlington Industries, Inc. ("Burlington") to comply with its severance pay policy. In addition to North Carolina, at least 46 states and the District of Columbia have similar laws designed to enforce employer obligations to pay wages due to employees, and 31 of those jurisdictions include severance pay among the wages whose payment is enforced. These jurisdictions have established and maintain programs to assist their citizens in the enforcement of rights acquired through the employment relationship. By virtue of these laws and programs, these states' capacity to aid employees in obtaining wrongfully denied benefits is far greater than any remedy provided by ERISA or any federal agency.

If the Fourth Circuit's decision is upheld, these states will be precluded from carrying out their traditional wage and hour enforcement responsibilities in the unfortunately all-too frequent instances that employers fail to keep their promises to pay severance benefits. The states' substantial interest in retaining their authority to protect their citizens from such abusive employment practices prompts the *amici* to submit this brief in support of the North Carolina Commissioner of Labor.

(footnote continued from previous page)

from the decision in *Gilbert* v. *Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *appeal filed sub nom. Roberts* v. *Burlington Industries, Inc.*, 54 U.S.L.W. 3179 (U.S. Oct. 1, 1985) (No. 85-441), which involves the same issues presented in this appeal.

Summary of Argument

This Court should grant plenary consideration of the substantial federal question of preemption raised by this appeal. Whether ERISA preempts state wage enforcement statutes insofar as they compel employers to abide by their own severance pay policies is a question of vital concern to the states, since protecting employee health and welfare has historically been their responsibility. The decision of the Court of Appeals, if allowed to stand, will radically intrude upon the states' traditional authority in this area in a manner never intended by Congress. In addition, it will deny millions of employees throughout the country the valuable protection and administrative procedures afforded by state laws.

Moreover, the precise question raised by this appeal, whether an employer's bare promise to pay a benefit such as severance pay establishes an "employee welfare benefit plan" within ERISA's meaning, has never before been addressed by this Court. In answering that question affirmatively, the Fourth Circuit misinterpreted the scope of ERISA's coverage, which is limited to employee benefit "plans," entities distinct from the employer itself, and does not include a simple payroll practice in which an employer pays its workers a benefit out of the company's general assets.

I. THIS COURT SHOULD GRANT PLENARY CONSIDERATION BECAUSE THE ISSUE PRESENTED IS OF GREAT IMPORTANCE TO ALL STATES AND MILLIONS OF EMPLOYEES THROUGHOUT THE COUNTRY.

Almost every state in the nation is affected by the issue presented by this appeal. Forty-six states and the District of Columbia have laws similar to North Carolina's requiring employers to pay promised wages. Thirty-one of those forty-seven jurisdictions include severance pay promises as enforceable under their laws. The effect of the Fourth Circuit's decision in this case, if not reversed, would be to preempt these numerous provisions and destroy the traditional balance between federal and state authority to protect employees' rights to earned compensation.

Historically, federal laws regulating employee compensation have permitted the states to establish or maintain parallel legislation providing similar or more protective rights, and have left them free to establish administrative mechanisms to make enforcement of claims a real possibility for workers who might otherwise be unable to afford the cost of judicial enforcement. *See, e.g.*, § 18 of the Fair Labor Standards Act, 29 U.S.C. § 218; § 14 of the Age Discrimination in Employment Act, 29 U.S.C. § 633; and § 1104 of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4. Far from preempting state regulation, these federal laws encouraged the growth of the protective wage and hour legislation which the Fourth Circuit's holding has now thrown into jeopardy.

This appeal merits plenary consideration because, in enacting ERISA, Congress simply did not intend such a radical disruption of the states' traditional authority as

would result from the Court of Appeals' decision.* Instead, Congress intended to *increase* the protections available to workers in an area that had been entirely unregulated by state law: that is, the realm of employee benefit funds, entities which are independent from the employers that establish them and which had escaped meaningful control because of their legally separate status. *See infra,* pp. 9-14. By contrast, simple payroll practices, in which an employer merely promises to pay a benefit out of the company's general assets, had long been adequately regulated by the states,** and nothing in ERISA or its legislative history suggests that Congress intended to invade this area of historic state responsibility. *Id.*

Indeed, Congress had no reason to disturb or attempt to improve upon state laws regulating such payroll practices, since the states had developed effective mechanisms to assist employees in collecting earned benefits owed to them directly from their employers. For example, each of the thirty-one jurisdictions enforcing severance pay promises provides an administrative procedure to assist

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* The Fourth Circuit's holding that Burlington's simple payroll practice is a benefit "plan," subject exclusively to ERISA regulation, also could have disasterous consequences for the states' ability to legislate in a score of other areas which in some way involve or touch upon employee benefits. For example, many states regulate certain professions by requiring periodic or occasional training. *See, e.g.,* N.Y. Gen. City Law §§ 18 and 20(27). Many states also regulate child day care centers. *See, e.g.,* N.Y. Social Serv. Law § 390. Yet, since ERISA's definition of a benefit plan expressly encompasses plans which provide training and day care, under the Court of Appeals' holding, any time an employer simply promises to provide such a benefit, it becomes subject to ERISA regulation and the states are precluded from enforcing their laws.

** For example, N.Y. Labor Law § 191, subd. 3, New York State's wage enforcement statute comparable to N.C. Gen. Stat. § 95-25.7, derives from legislation (former §§ 196 and 196-c of the Labor Law) which has its origin in statutes first adopted in 1890. *See People* v. *Vetri,* 309 N.Y. 401, 405, 131 N.E.2d 568, 570 (1955); 1906, Op. N.Y.S. Att'y Gen. 448.

in substantiating and collecting employees' unpaid wages.* These jurisdictions maintain administrative staffs to help employees pursue their claims and, in many of the jurisdictions, to bring criminal actions and/or civil suits on behalf of the employees against delinquent employers. Such procedures and assistance have proved to be crucial in ensuring payment of the promised severance pay, since the number of employees or the amount of money involved often is so small that pursuit of a claim is otherwise practically impossible.**

The Fourth Circuit's holding therefore would have a devastating impact on the millions of workers in the many states that enforce employer promises of severance pay in the event that their employment is ever terminated,*** an effect contrary to Congress' intent to expand worker protection. By interpreting ERISA as preempting these valuable state laws and establishing it as the only basis

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* The Appendix to this brief contains examples of assistance available to employees in several of the *amici* jurisdictions.

** In the five-year period from 1980-1984, the New York State Department of Labor handled 16,453 claims for wage supplements and collected $3,073,144 in unpaid benefits. While such benefits are crucial to a family trying to make ends meet until new work can be found, at an average of less than $190 per claim, the cost of court and attorney's fees makes collection impractical in the absence of state administrative assistance.

*** Although many of the employees in this case found employment with Burlington's successor, the Court of Appeals' decision is equally applicable in situations where employees are out of work for long periods of time. The potential effect of the court's ruling is indicated by a recent study of twenty-one million employees from a cross-section of the nation's medium and large private firms. That study shows that sixty-one percent of professional and administrative employees, fifty-seven percent of technical and clerical employees and thirty percent of production employees are eligible for severance pay under their employers' policies. *See* "Employee Benefits in Medium and Large Firms, 1984," U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2237 (June 1985).

for collecting severance pay, the Court of Appeals' decision virtually ensures that most claims for such benefits will never be satisfied. ERISA requires an employee to bring a civil action in federal or state court in order to collect even one week's worth of severance pay, since ERISA does not provide an administrative mechanism for the collection of benefits. 29 U.S.C. § 1132(a). The thirty-one jurisdictions enforcing severance pay obligations have, collectively, more than a thousand persons on staff to assist employees in pursuing their claims, while the United States Department of Labor has almost no facilities or personnel to handle employee complaints.*

Furthermore, an employee forced to pursue a claim for severance pay under ERISA may be much less likely to vindicate the claim than under state law, because ERISA generally has been interpreted to impose only a fiduciary standard of conduct on a plan administrator who fails to pay a promised benefit. The employee in such a case has the burden of proving that the administrator acted arbitrarily or capriciously in denying the benefit, rather than being able to simply enforce the employer's promise as a contractual obligation. *See, e.g., Pompano* v. *Michael Schiavone & Sons, Inc.*, 680 F.2d 911 (2d Cir.

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* For example, the New York State Department of Labor, Division of Labor Standards, employs approximately 125 professionals to investigate and conciliate complaints of employer failures to pay wages and benefits within the State. The Division maintains eleven district and sub-district offices throughout the State to receive such complaints.

By contrast, the United States Department of Labor ("USDOL"), Office of Pension and Welfare Benefit Programs, has only two offices for all of New York, New England and part of New Jersey. These two offices employ only 37 investigators, whose principal function is to inspect trust fund records to discover mismanagement or fraud in the handling of fund assets by fund trustees, not to assist employees in obtaining earned but unpaid benefits. In no case does the USDOL bring a civil or criminal action to compel payment of benefits due to an employee.

1982); *Horn* v. *Mullins*, 650 F.2d 35 (4th Cir. 1981); *Smith* v. *CMTA-IAM Pension Trust*, 654 F.2d 650 (9th Cir. 1981). As this case so well demonstrates, when employees are subjected to that burden of proof, they are often unable to recover benefits which they might otherwise recover under state laws, since the state laws generally only require the employee to establish that the employer promised to pay the benefit and then defaulted on the promise.

The direct consequence of decreasing the likelihood that employees will receive their promised severance pay is an increase in the social and economic burdens upon the states and their citizens. If employees are not paid their severance wages when due, they and their families often suffer severe financial hardship. Many wage earners live on such tight budgets that the loss of just one paycheck can result in a family crisis. Rent goes unpaid, utilities are shut off, and even sufficient amounts of food and other necessities can become unaffordable. When such financial crises strike families, states bear the financial burden through social service programs designed to protect the general welfare of their citizens. Unemployment benefits, general and special assistance, and other costly forms of social relief increase when earned wages go unpaid. These social programs cost the state and their taxpayers substantial sums of money.

Since the Fourth Circuit's decision thus would cripple employees' ability to recover earned but unpaid severance pay, create substantial burdens on state economies and taxpayers, and destroy the balance of state and federal authority to protect employee wages and benefits, this Court should grant plenary consideration of this appeal to restore the proper balance that Congress intended and to preserve state authority in an area of critical importance to working people.

II. WHETHER A SIMPLE PROMISE TO PAY SEVERANCE BENEFITS CONSTITUTES A "WELFARE BENEFIT PLAN" WITHIN THE MEANING OF ERISA IS A SUBSTANTIAL QUESTION WARRANTING THIS COURT'S PLENARY CONSIDERATION.

A. *Congress Did Not Intend That ERISA Regulate Employer Promises to Pay Benefits to Employees.*

1. Congress Intended ERISA to Regulate the Unregulated Field of Benefit Plans.

ERISA's legislative history demonstrates unequivocally that Congress viewed it as regulating entities separate and distinct from employers. Even though benefit funds were established by employers (and sometimes by unions), they had a legal existence of their own in which they, not the employers who established them, were liable for payment of benefits. It was precisely the separate and independent status of these funds that lead to the problems which Congress sought to remedy through ERISA.

In 1974, after extended study, Congress enacted ERISA to protect the interests of participants in employee benefit plans. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). One of the central purposes of ERISA was to prevent the "'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374 (1980).

The subject of congressional concern, the benefit plan, was a "relatively modern economic institution" which had become an important social and economic factor only since the mid-1940's. H.R. Rep. No. 533, 93d Cong., 2d Sess. ——, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4640. Benefit plans, Congress found, were subject to

only minimal, inadequate federal regulation* and were virtually unregulated by state legislation. *Id.* at 4641-42. *See* Senate Committee on Labor and Public Welfare, Final Report on Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess. 68 (1956); Senate Committee on Labor and Public Welfare, Interim Report of Activities of the Private Welfare and Pension Plan Study, S. Rep. No. 634, 92d Cong., 2d Sess. (1972). The plan participants were left to rely upon the state common law of trusts, codified in only a few states, which Congress found insufficient because state law, like existing federal law, did not adequately protect the security of pension benefits. *See* H.R. Rep. No. 533, 93d Cong., 2d Sess. ——, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4643.

Employers' compensation practices, on the other hand, were not a recent phenomenon and had for decades been effectively supervised by state courts and administrative systems, pursuant to legislation and common law contract principles. Congress' concern thus was not with enforcing *employer* contractual obligations to employees, but with the inability or unwillingness of *benefit plans* to meet their benefit obligations to participants because of overly strict vesting requirements, inadequate funding, and misfeasance and malfeasance by the administrators and trustees.**

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* Not until 1958 did Congress enact legislation, the Welfare and Pension Plans Disclosure Act, repealed by ERISA, which was specifically designed to regulate benefit plans. *See* 29 U.S.C. § 301 *et seq., repealed by* ERISA § 111(a)(1), 29 U.S.C. § 1031(a)(1). By requiring the disclosure of information about plans, that Act was intended to permit the participants to protect themselves. However, without substantive standards for plan operation, its intent was not fully achieved. H.R. Rep. No. 533, 93d Cong., 2d Sess. ——, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4641-42.

** In 1971, the Senate Committee on Labor and Public Welfare reported on a number of case histories illustrating these flaws in

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In ERISA, therefore, Congress prescribed minimum standards of vesting, funding, and fiduciary conduct to minimize the risk that workers would lose expected benefits. 29 U.S.C. §§ 1053, 1082, and 1102-1104. It provided a system of compulsory benefit insurance to protect the security of benefit rights in the event of benefit plan termination. 29 U.S.C. §§ 1321-1323. Congress also created a federal right of action for employees to recover benefits due from a plan. 29 U.S.C. § 1132(a) and (f). Such provisions would have been superfluous if Congress' intent in ERISA had been to regulate an employer's contractual liability to its employees and provide a remedy for an employer's breach of its contract obligations.

The problems which ERISA was enacted to remedy—the lack of employee knowledge about plan terms and conditions, and the risk of loss of benefits in the event of plan termination because of underfunding, lack of vesting provisions, and negligent or fraudulent plan management—were problems which prior to ERISA had no adequate remedy in the law. There existed no federal and only a few state statutes providing a right for an employee to sue a plan and, even if an employee did sue under state law, the common law of trusts which was generally applied to that type of a claim was not adequate to pro-

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the private benefit plan system. For example, in one case, a joint union-employer trust plan had no vesting provision and had $800,000 in loans outstanding for which there was no collateral. Similarly, the Senate Committee pointed to a major aerospace company's pension plan in which 20,000 out of 60,000 participants left the plan without entitlement to any benefit, even though one-fourth of those 20,000 had over five years of service. Furthermore, that plan's liabilities exceeded its assets by more than $75 million. Thus, the report concluded, "if the plan were to terminate today, employees with vested benefits would have no legal remedy to obtain all their vested benefits." S. Rep. No. 1734, 84th Cong., 2d Sess. (1956), Appendix at 138.

tect the employee's rights.* *See* Senate Committee on Labor and Public Welfare, Final Report on Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess. 65-68 (1956).

2. Congress Did Not Intend ERISA to Supplant and Nullify Direct Employer Liability for Employee Benefits.

Congress was well aware that employers, having established a plan, had no financial responsibility for benefit payments beyond the contributions they were committed to make.** Senate Committee on Labor and Public Welfare, Interim Report of Activities of Private Welfare and Pension Plan Study, S. Rep. No. 634, 92d Cong., 2d Sess. 74 (1972). Given that understanding and the fact that states had been regulating employer compensation prac-

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* The report on the House version of ERISA states:

> In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding. *Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording.* Thus, under present law, accumulated pension credits can be lost even when separated employees are within a few months, or even days, of qualifying for retirement.

H.R. Rep. No. 533, 93d Cong., 2d Sess. ——, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4643 (emphasis added).

** For example, Representative Erlenborn commented:

> At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time generally has not made a promise to pay the pension, only to make periodic contributions.

120 Cong. Rec. 4285 (Feb. 26, 1974), *reprinted in* 2 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 3388 (Comm. Print 1976).

tices for decades, it is plain that ERISA was not intended to regulate employer-employee agreements involving benefits, and nothing in its text indicates otherwise.* To the extent Burlington's policy constitutes an obligation to pay benefits directly to its employees, the policy is not governed by ERISA.

That ERISA does not regulate or limit an employer's direct contractual obligations to its employees was noted by this Court in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980). In *Nachman*, the Court found a difference between "plan liability" for benefits and "direct employer liability" for benefits. The employer in *Nachman* disclaimed liability in the plan document for payment of benefits. When the plant closed and the plan was terminated, the plan had only enough assets to cover 35 percent of the vested benefits. ERISA provides insurance for such terminations through the Pension Benefit Guaranty Corp. ("PBGC"), but imposes reimbursement liability on the employer for benefits paid by PBGC for up to 30 percent of the employer's net worth.

The employer asked the court for a declaration that it had no reimbursement liability, since it had disclaimed liability for any benefits beyond those which the plan's funds could satisfy and the plan could not satisfy the full amount of the benefit obligations. The employees,

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* The statutory provisions are directed to the regulation of a "plan" as an entity apart from an "employer." *See* 29 U.S.C. §§ 1022 and 1102. Under ERISA, the plan is to have a plan administrator who is required to publish and file an annual report for the plan. 29 U.S.C. §§ 1023 and 1024. A plan may sue and be sued, and a judgment against a plan is not enforceable against the employer who established it. 29 U.S.C. § 1132(d)(1) and (2). ERISA also prohibits certain transactions between a plan and the employer. 29 U.S.C. §§ 1106(a) and 1107.

the company argued, had no right to the full amount; therefore, it had no reimbursement liability.

Holding that a plan's liability governed by ERISA and addressed by plan termination insurance is separate from an employer's direct liability for benefits, this Court rejected the employer's argument. The Court distinguished clearly between the rights of employees to benefits which are enforceable against the plan and the rights employees may enforce directly against their employer: even if an employer by agreement limits its direct liability for benefit payments to employees, by doing so it cannot limit its employees' rights against the plan, rights which are regulated by ERISA. *Id.* at 378. The employer's disclaimer operated to protect it only from direct liability for benefit claims, and, indeed, this Court noted, had the employer not disclaimed liability, "the employees could sue the employer directly." *Id.* at 379 n.29.

The Fourth Circuit's decision in this case therefore is contrary to this Court's interpretation of ERISA in *Nachman*. *Nachman* distinguished between plan liability and employer liability and acknowledged that, in the absence of a disclaimer by the employer, employees could sue their employer directly. Given this Court's acknowledgement that ERISA does not alter the direct liability of an employer for benefits, the decision of the court below is simply incorrect: an employer's simple promise to directly pay its employees a benefit out of the company's assets may be enforced under state law.

B. ***United States Department of Labor Regulations Interpreting ERISA Establish That an Employer's Promise to Pay Benefits Directly to Its Employees Out of the Company's General Assets Is Not a "Plan" Within the Meaning of ERISA.***

The potentially unlimited breadth of the definition of "employee welfare benefit plan" in § 3(1) of ERISA prompted the USDOL to issue a clarifying regulation interpreting that definition to exclude employer "payroll practices" in which an employee receives compensation directly from employer assets. 29 C.F.R. § 2510.3-1. As examples of these "payroll practices" excluded from ERISA's coverage, the regulation lists sick leave pay, *id.*, § 2510.3-1(b)(2), and holiday and vacation pay, *id.*, § 2510.3-1(b)(3)(i), each of which is, like severance pay, a benefit enumerated in the section of ERISA describing the benefits which may be the subject of an ERISA plan. 29 U.S.C. § 1002.*

The USDOL excluded such practices from ERISA coverage because they are "associated with regular wages or salary," and, furthermore, because "the abuses which created the impetus for the reforms in [ERISA] were not in this area, and there is no indication that Congress intended to subject these practices to [ERISA's] coverage," notwithstanding that the broad language of the definition of "plan" could arguably cover them. Notice of Proposed Rulemaking, 40 Fed. Reg. 24642, 24642-43 (June 9, 1975). However, the regulation excludes these "payroll practices" only if the compensation is paid directly from the employer out of its general assets. 29 C.F.R. § 2510.3-1(b). This is in accord with Congress' intent since, where

* While the regulation does not specifically mention severance pay, it expressly states that the listed practices are only examples and that the list is not meant by the USDOL to be exhaustive. 29 C.F.R. § 2510.3-1(a)(4).

the employer itself is obligated to make the payments, there is no need for any special protection to secure the employees' benefits because the employees may sue the employer directly for the benefits, and a remedy under ERISA would add nothing to that long-established right. Only where there exists an entity other than the employer liable for the payments would the concerns of Congress require ERISA coverage.

No logical basis exists for distinguishing severance pay from the other "payroll practices" which the USDOL regulation excludes from ERISA's coverage. Severance pay, under Burlington's policy, is compensation paid directly by the employer out of its general assets, it is calculated on the basis of an employee's regular wages and length of service, and it is treated by Burlington as regular wages. It is an obligation for which Burlington itself, and not a separate and distinct plan, is liable.

Accordingly, under the reasoning of the USDOL regulation interpreting the scope of ERISA's coverage, Burlington's simple promise, contained in its personnel manual, to pay severance pay to its employees is not a "welfare benefit plan" within the meaning of ERISA. Burlington's severance pay policy therefore is not subject to ERISA's exclusive regulation, and state statutory and common law remedies remain viable means of enforcing that policy.

CONCLUSION

For all of the foregoing reasons, this Court should summarily reverse the opinion of the Fourth Circuit or grant plenary consideration of the significant question raised by the appeal of the North Carolina Commissioner of Labor in this case.

This 31st day of December, 1985.

Respectfully submitted,

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APPENDIX

Summary Description of Wage Payment Laws of Alaska, Connecticut, District of Columbia, Hawaii, Illinois, Maryland, Montana, Oklahoma, Vermont and Wisconsin

Alaska

Alaska has two wage collection statutes. One provides specifically for actions arising from violations of the minimum wage and/or overtime laws. This statute is commonly referred to as the "Alaska Wage and Hour Act," and closely parallels the Fair Labor Standards Act of 1938, as amended. *See AS 23.10.050-.150*

The second statute relates to wage claims, in general. *See AS 23.05.140-.260.* Claims accepted under this statute involve the contractual aspect of employment which deal with fringe benefits, primarily vacation or severance pay. An Alaska wage earner may choose a civil remedy either through the resources of the Department of Labor or on his own under a workman's independent right of action. The second remedy is exclusively used where the wages or benefits in question exceed the department's statutory minimum, exclusive of penalties, of $5,000. The Department has the authority to use internal administrative adjudication processes to resolve complaints. These processes, however, are not obligatory and the Department may move a claim directly into the courts for a final solution.

The courts are generally reserved for serious disputes or for employers subject to recidivism. Most claims are handled quickly using one or more informal conferences involving an investigator, the claimant, and the employer or employer representative, frequently an attorney. The

more formal hearing process is reserved for fact finding to clarify complicated questions of law, or to determine if criminal as well as civil sanctions are in order.

In Alaska there are currently 12 investigators and 4 technicians who investigate claims for wages and benefits or enforce other labor laws. The Department investigates and resolves 1,600 claims per year with the average resolution time, outside of court, being 5 months. It may take from 7 months to 2 years to litigate a claim depending on the amount of the claim and legal complexities which dictate whether the matter will be heard at the district or superior court level. About 10 percent of the Department's cases require formal litigation for resolution. The Department's resources are without charge to the claimant while legal fees in the private sector begin at about $85 per hour.

CONNECTICUT

The Connecticut Commissioner of Labor, through the Department of Labor, Division of Regulation of Wages, oversees enforcement of Connecticut's wage payment laws. *See* Connecticut General Statutes §§ 31-71a through 31-71i, 31-72 and 31-76k. Specifically, § 31-76k requires an employer to pay terminated employees all accrued fringe benefits where the employer has a policy or is party to a collective bargaining agreement providing for payment of such benefits upon termination. The fringe benefits covered by § 31-76i include vacations, holidays, sick days and severance pay. When the Department of Labor receives a complaint from a terminated employee that promised fringe benefits have not been paid, it engages in an administrative investigation through the mails or in person using one of its six Wage Employment Agents. An administrative hearing may be held if necessary to determine dis-

puted issues. When it determines that an employer has unlawfully failed to pay fringe benefits, the Department of Labor can initiate either a criminal action under § 31-71g or a civil action under § 31-72 to collect double damages.

DISTRICT OF COLUMBIA

The District of Columbia Wage Payment and Wage Collection Law, 36 D.C. Code §§ 101-110 (1981 ed.) enacted by Congress in 1956 (70 stat. 976), requires employers to make timely payment of wages to employees employed in the District of Columbia.

When an employer fails to pay wages (including vacation pay and severance pay) as required, an aggrieved employee has two recourses: he or she may file an action in court to recover the unpaid wages and liquidated damages, or file a complaint with the Office of Wage-Hour, D.C. Department of Employment Services. If the employee chooses the latter course, the employer is notified by letter of the filing of the complaint and the date and time of an administrative hearing. If a determination is made that the employer is in violation of the law, and refuses to pay wages found due, the case is transferred to the Corporation Counsel of the District of Columbia for filing of criminal charges or a civil action.

With a staff of 4 wage-hour compliance specialists assigned to investigate complaints and conducting administrative hearings, the staff during the past 5 years (1980-84) has processed 4,564 complaints from employees alleging violations of the Wage Payment and Wage Collection Law. Slightly more than one million dollars has been recovered in unpaid wages and damages for employees.

HAWAII

In Hawaii, an employee who is not paid all wages due may either file a claim with the State of Hawaii's Department of Labor and Industrial Relations or bring a civil action in a state court to recover any monies owed.

The Department of Labor and Industrial Relations, under the statutes and administrative rules and regulations relating to the Payment of Wages and Other Compensation Law, Chapter 388, Hawaii Revised Statutes, investigates and conciliates unpaid wage claims including vacation, sick, and severance pay. The law does not require the employer to pay any set amount as pay and benefits, but only to pay what the employer has promised to pay to the employee. If, after an investigation substantiating a claim for unpaid wages or other compensation is completed and the employer fails or refuses to pay the employee, the Department of Labor and Industrial Relations may file a lawsuit on the employee's behalf to collect the amounts owed. If the Department prevails in the lawsuit, the Department may recover, in addition to the unpaid wages, a penalty in an amount up to the amount of the wages due. The court must also order the employer to pay the costs of bringing the action and reasonable attorney's fees.

When the employee brings a civil suit, the employee, too, may recover the civil penalties as well as the costs and reasonable attorney's fees.

The statute also provides for criminal penalties. It is a misdemeanor for any employer to fail to pay wages under the Payment of Wages and Other Compensation Law or for any officer of a corporation to knowingly permit the corporation to fail to pay wages. The employer or officer is subject to a fine of not less than $100 or more than $10,000.

Seven investigators investigate and conciliate the approximately 1,200 claims which are filed each year with the Department. Approximately 90 cases were referred to the Attorney General for legal action during the last completed fiscal year.

Any complaint filed under ERISA is not accepted in Hawaii but must be filed in Washington, D.C. with the Division of Inquiries and Technical Assistance. Whether or not prompt action is taken on these complaints is not known. Therefore, it is very important to the people of Hawaii that the Payment of Wages and Other Compensation Law continue to be applicable in the area of wages and benefits.

ILLINOIS

The Wage Claim Division of the Illinois Department of Labor is responsible for enforcing the Wage Payment and Collection Act, Ill. Rev. Stat., Ch. 48, pars. 39m-1 to 39m-16 (1983).

Section 2 of the Act includes in its definitions of "wages" and "final compensation" any compensation owed an employee by an employer pursuant to an employment contract or agreement between the two parties. Even before this language was added to the statute, an Illinois appellate court construed the Act as covering severance pay claims.

Section 11 of the Act outlines the duties and powers of the Department, which include the authority to take assignments of wage claims and proceed civilly and to cause criminal complaints to be prosecuted. The statute also preserves a private right of action.

Workers who want to file a claim for wages or final compensation fill out a short application form. If the Division has jurisdiction, it writes to the worker's employer and asks for payment or a written response to the claim.

If the employer fails to respond, or if the worker disputes the response, the Wage Claim Division schedules a hearing in one of nine cities: Chicago, Springfield, Rockford, Peoria, Champaign, Marion, Collinsville, Rock Island or Effingham. At the hearing, a labor conciliator listens to both sides and examines any witnesses or written evidence. If the worker and employer do not reach a voluntary settlement, the conciliator either dismisses the claim or issues a demand for payment.

If the employer fails to comply with the demand, the Division institutes prosecution. An employer convicted of violating the Wage Payment and Collection Act can be sentenced to 30 days in jail or fined $500.00 for each day on which a violation occurs.

During the fiscal year ending June 30, 1984, the Illinois Department of Labor received 10,528 wage complaints claiming $15,498,980 due. Of this amount $3,786,232 involved vacation pay, severance pay or other fringe benefits. The Department held 8,827 hearings on wage claims during that year and resolved complaints involving $13,977,315. All of this was accomplished with a staff of fourteen.

MARYLAND

The intent of the Maryland Wage Payment and Collection Law is to provide a quick, simple method for employees to collect monies which were due them for services performed without cost to the employee. There are, of course, other remedies available to employees. Those remedies are, in most instances, time-consuming and involve either considerable cost to the employee or require certain knowledge which the employee does not have. A court date for a civil suit in the lowest state court is usually

two to three months in the future. A fee of $250.000 is the minimum charged by an attorney to prepare and litigate even the simplest civil suit. Even with the loose and informal procedures in the small claims court, the employee generally does not have the knowledge to pursue his claim.

The vast majority of claims are for relatively small amounts, usually two weeks' pay or less. The claimants are generally in the lowest paid jobs, many working at minimum wage. In 1983, the average amount collected per valid claim was $297.18.

The nature of these claims mandates that they be resolved as quickly as possible. The vast majority of cases received by the Employment Standards Service are resolved within 30 days. An administrative assistant and two clerical employees conduct the office functions; office and field functions are supervised by a Wage and Hour Investigator Supervisor. Approximately 40 percent of all claims are investigated by three specialists; the remainder are assigned to 16 other investigators in their areas of residence. Generally, the issues involved are emotional, requiring the investigator to exercise extreme tact and diplomacy to resolve the claim quickly and to the reasonable satisfaction of both parties. Because of the variety of employers involved, each investigator must have a broad business background.

The Wage Payment and Collection Law is codified as Article 100, Section 94, *Annotated Code of Maryland*. Subsection 94(4)(3) defines wages as "any remuneration, compensation, bonus, commission, and/or fringe benefit promised in return for services by an employee." By administrative decision, vacation pay, holiday pay, severance pay, pension payments, insurance payments and any and

all fringe benefits are included in the definition of wages. Simply stated, the employee must get what he was promised and this agency stands available to investigate all claims of nonpayment of promised monies.

A Wage Payment and Collection claim usually is initiated by a telephone call from an employee: "My boss won't pay me what he owes me." Two claims forms, one a condensed version of the other, are mailed to the employee. Once the completed forms are returned to the Service, confirmation of receipt is sent to the claimant. The condensed form is then sent to the employer with a letter explaining that the Commissioner has received a claim alleging that the employee is due wages which were earned but not paid.

If the employer agrees that the claim is valid, the employer is instructed to forward a check to the Employment Standards Service, payable to the Division of Labor and Industry. If the employer asserts that the claim in invalid, the employer is instructed to provide an explanation and documentary evidence to support the employer's position. The employer is informed that in the event a reply is not received, an investigator will meet with the employer at a specified time and date to attempt to resolve the claim.

In approximately 20 percent of all Wage Payment and Collection cases, a check or other adequate response is received. In these instances, a decision is made without the necessity of a personal visit by an investigator. If a response is not received or is inadequate, a Wage and Hour Investigator visits the employer at the scheduled date and time and attempts to resolve the claim. If agreement is reached, a check is collected for the claimant. If a claim cannot be resolved and the claim is determined to be valid,

the case is sent to the Office of the Attorney General for appropriate legal action.

During 1984, a total of 2,128 claims were investigated. A total of 467 claims were filed for vacation pay, or 22% of the total claims filed. Forty-three claims were filed for severance pay, or 2% of the total filed.

The informal, "let's get this dispute settled" method of resolving these claims result in speedy service to the claimant. A more structured approach as practiced by many federal agencies would result in a long protracted period where the employee would be deprived of wages which are sorely needed. The great number of claims would necessitate a huge increase in the number of federal compliance officers to investigate and resolve the claims. Many claims which are filed with this office are filed as a result of a referral from the Wage and Hour Division of the United States Department of Labor. There is no question but that the individual states are better able to serve the citizens in the collection of unpaid wages.

MONTANA

Montana's Wage Payment Act (Montana Codes Annotated §§ 39-3-201 through 39-3-215) provides one of the two alternatives a wage claimant may use to collect wages.

The other one would be to file a civil suit in court. In most cases court calendars are extremely burdened with cases and resolution is extremely slow.

When a wage claim is received in the office of the Labor Standards Division of the Montana Department of Labor and Industry, an investigation is commenced and a determination reached, if possible, of the validity of the claim.

In the event that either the claimant or respondent feels aggrieved by the determination, they have the right to a hearing. The hearing would be held under the Montana Administrative Procedure Act with rules of civil procedure and evidence applying.

If either party feels aggrieved by the decision of the hearing officer, the only appeal is to the District Court for judicial review. The Labor Standards Division may apply to District Court for a judgment or an order enforcing the decision of the hearing officer or a default order. *See* MCA § 39-3-212.

Employers doing business in Montana are not required by law to provide vacation pay, but once promised or made part of the employment agreement that promise must be complied with. *See* Attorney General's Opinion No. 56, September 17, 1949. Once earned, the vacation pay cannot be withheld by the employer or forfeited by the employee. Similarly, severance pay is not required by law to be given but meets the definition of wages once it's made part of the employment agreement.

In fiscal years 1982-1984, the Montana Department of Labor and Industry handled over 3,000 claims and collected over $1,400,000 in wages and fringe benefits owed.

OKLAHOMA

Title 40, Oklahoma Statutes 1982, § 165.1(3) defines wages as follows:

> "Wages" means compensation owed by an employer to an employee for labor or services rendered, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses and

> other similar advantages agreed upon between the employer and the employee, which are earned and due, or provided by the employer to his employees in an established policy, whether the amount is determined on a time, task, piece, commission or other basis of calculation.

Under Oklahoma law, holiday pay, vacation pay, severance pay, dismissal pay, bonuses and other similar advantages agreed upon between the employer and the employee which are agreed on as an established policy are wages.

Title 40, Oklahoma Statutes 1975, § 165.11 defines the penalty for failure to pay wages or wage supplements:

> A. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is a voluntary party to or subject to a bona fide written agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who willfully fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty (30) days after such payments are required to be made by law or by agreement, shall be guilty of a misdemeanor, and each such failure to make payment as required herein shall constitute a separate offense. Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.
>
> B. As used in this section, the term "benefits or wage supplements" includes, but is not limited to, reimbursement for expenses as agreed prior to contract-

ing said expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.

Oklahoma's wage complaint procedures involves:

(1) A letter apprising the employer of the wage complaint, reciting the law and the criminal remedy and asking that the employer respond or pay.

(2) If after the 2nd notice to employer we feel the wages are due and owing based upon the facts, we ask the District Attorney to prosecute. Penalty for failure to pay wages is a misdemeanor—*punishment is up to a $500.00 fine, one (1) year in the county jail, or both.*

In 1983, the Oklahoma Department of Labor received 3,058 claims. During that same year, the Department collected approximately $500,000 on 1,197 claims and referred to civil or criminal court an additional 1,147 claims involving more than $1,000,000.

VERMONT

In Vermont, when an employer has a written policy or other written agreement to pay its employees benefits or wage supplements, then, upon failure to pay such benefits, the employer becomes liable to its employees for actual damages and, in the event of fraud, is subject to criminal prosecution. *See* Title 21, Vermont Statutes Annotated, Section 345a.

A terminated employee who has failed to receive severance pay pursuant to his employer's written policy or agreement may complain to the Wage and Hour Division

of the Department of Labor and Industry for assistance. The Wage and Hour Division will investigate the claim and attempt to resolve it on an informal basis. Approximately two thirds of the complaints made to that division are resolved this way. If the unresolved complaint involves fraud, the Department of Labor and Industry will pursue criminal charges against the employer. If no fraud is involved, the employee is told of his right to sue for actual damages, and the Department's investigation file is made available for his use in the lawsuit.

WISCONSIN

The Wisconsin Department of Industry, Labor and Human Relations enforces Chapter 109, Wisconsin Statutes, "Wage Payments, Claims and Collection." This chapter requires employers to pay to every employee, at least once per month or within 15 days after termination, all wages earned. For the purpose of Chapter 109, "wages" are defined to mean remuneration payable to an employee for personal services, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses, and other similar advantages agreed upon between the employer and the employee or provided by the employer to the employees as an established policy. The Department investigates and tries to adjust controversies between employers and employees as to alleged wage claims. If the Department finds wages are due and an employer refuses to pay, it may file a lawsuit against the employer when the employee has assigned his claim to the Department. Chapter 109 grants a lien to the Department upon the property of an employer for the full amount of any wage claim

assigned to it. This lien is given precedence over all other debts, judgments, decrees, liens or mortgages against the employer. In a case where an employer fails to pay wages as required by Chapter 109, he is subject to both criminal penalties and increased liability of up to 50% of the wages owed. While precise statistics are not available, a significant portion of the wage claims investigated by the Department under Chapter 109 are severance pay claims.

Certificate of Service

I hereby certify that I have this day served copies of the foregoing Brief of *Amici Curiae* State of New York, *Et Al.* upon:

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/s/ ANDREW SCHULZ

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